United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1404

To be argued by
SHEILA GINSBERG

B
P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

JEROME STERNLIEB,

Appellant.

Docket No. 75-1404

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
JEROME STERNLIEB
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

SHEILA GINSBERG,
Of Counsel.

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QUESTIONS PRESENTED

1. Whether the District Court's failure to fulfill the sentence promise explicitly made to appellant before entry of his guilty plea requires that the case be remanded for resentence.

2. Whether imposition of a committed fine on appellant, who is indigent and, for that reason, unable to pay the fine and thereby subject to at least thirty additional days of confinement, is unconstitutional.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This appeal is from a judgment of conviction entered on December 5, 1975, after a guilty plea in the United States District Court for the Southern District of New York (The Honorable Robert J. Ward) finding appellant Sternlieb guilty of two one-count indictments charging wire fraud (18 U.S.C. §1343). On December 5, 1975, appellant was sentenced to a five-year term of imprisonment on Indictment 75 Cr. 367. On Indictment 75 Cr. 789, a five-year term of imprisonment was imposed, execution of the sentence suspended, and a five-year term of probation imposed to run consecutively to state sentences already imposed. A $1,000 committed fine was also imposed.

The Legal Aid Society, Federal Defender Services Unit, was continued as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

A. The Plea Proceeding

Appellant, Jerome Sternlieb, was charged in two separate indictments (75 Cr. 367 and 75 Cr. 789*), each alleging one

*The indictments are "B" and "B-1", respectively, to appellant's separate appendix.

count of wire fraud, in violation of 18 U.S.C. §1343. Both indictments* charge similar offenses.

The crime set forth in Indictment 75 Cr. 367 related to appellant's March 28, 1975, telephone call to the Valley National Bank in Las Vegas, Nevada, in which he pretended to represent Caesar's Palace Hotel and directed that the bank charge to the hotel's account and transfer $1,000 to the New York account of Jerome Sternlieb. The money was subsequently wired to New York and appellant received it at a branch of his bank (9-10**).

The crime set forth in Indictment 75 Cr. 789 pertained to appellant's April 2, 1975, telephone call to the Bank of Nevada in which he misrepresented himself to be the comptroller of Caesar's Palace Hotel, and again directed that $1,000 be charged to the hotel's account and transferred to the account of Jerome Sternlieb at the Irving Trust Company in New York City. Appellant was arrested when he arrived at the Irving Trust Company to pick up the check (10-13).

At the outset of the September 23, 1975, proceedings, defense counsel's argument that both indictments charged the

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*Indictment 75 Cr. 789 charges a crime for which appellant was originally indicted in the District of Nevada but which was transferred to the United States District Court for the Southern District of New York pursuant to Rule 20, Federal Rules of Criminal Procedure.

**Numerals in parentheses refer to pages of the transcript of proceedings dated September 23, 1975. The entire transcript of those proceedings is "C" to appellant's appendix.

same scheme produced the following commitment from Judge Ward:

> Let me say this, to cut through the whole matter: If I determine that they are separate I am telling you now that I will sentence concurrently. Does that satisfy everyone?
>
> (5).

Specifically, he explained:

> So, basically, whether I would give you a total ten-year sentence, at least in theory I am telling you now that I would sentence you to a maximum term of five years on each count to run concurrently plus a fine of $1,000.
>
> (5-6).*

To satisfy the Government's concern that the record reflect that each indictment charged a separate crime, the Judge stated further:

> I don't disagree, but I am trying to take what I think is the practical approach in the context of this case. I'm assuming for the moment that you are correct, but in the context of this case, as I understand it, with all its ramifications, I would suggest that rather than complicate the issue I am saying now that if there were two separate crimes I would consider that the sentences should be imposed concurrently.
>
> (6).

After the prosecutor approved the Judge's promise of concurrency, the Judge addressed appellant, asking:

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*18 U.S.C. §1343 provides with regard to penalty:

> Whoever ... shall be fined not more than $1,000 or imprisoned not more than five years, or both.

> Mr. Sternlieb, relative to pleading guilty and facing what would be a maximum term of five years plus a fine of $1,000, have you conferred with your attorney, Mr. Gutman, about pleading guilty?
>
> (7).

In his inquiry with regard to whether promises had been made to appellant to induce his plea, the Judge re-stated his promise:

> Have any promises of any sort been made to you to induce you to plead guilty other than the statement that I made a moment or two ago that I would anticipate that any sentences I would impose would be concurrent? Have any other statements or promises of any sort been made to you to induce you to plead guilty?
>
> (7).

Appellant thereafter pleaded guilty to both indictments (10-13), and the plea was accepted (15).

B. The Sentencing

At the time of sentencing, the Judge, in response to defense counsel's request that appellant be placed on probation, referred to appellant's prior record and concluded that it established that probation would be inappropriate (D.10-12*).

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*Numerals in parentheses preceded by "D" refer to pages of the transcript of the sentencing proceeding dated December 5, 1975. The entire transcript of the sentencing proceeding is "D" to appellant's separate appendix.

The Judge then sentenced appellant to a five-year term of imprisonment on Indictment 75 Cr. 367. On Indictment 75 Cr. 789, he sentenced appellant to pay a $1,000 committed fine* and to serve a five-year term of imprisonment, execution of which was suspended and supplanted by a five-year probationary term to run consecutively to the New York state sentences already imposed** (D.13-14).

Defense counsel objected to the consecutive sentence imposed on the grounds that the Court had promised to sentence on both indictments concurrently. The Judge acknowledged a promise, but he asserted the belief that he had complied with it. According to Judge Ward, the terms of the promise were only that he would not sentence to consecutive periods of confinement (D.14). Specifically, he said:

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*Of the fine, Judge Ward said:

> The defendant is ordered to stand committed until the fine is paid or he is otherwise discharged by due course of law.
>
> (13).

**At the time of his guilty plea to the Federal charges, appellant had already pleaded guilty in Queens Supreme Court to a third degree grand larceny charge (75 Cr. 1032) and in Yonkers City Court to a petit larceny charge (758 Cr. 75). In addition he was also subject to a parole violation on a sentence for which he owed one year, six months, and eighteen days. On September 10, 1975, appellant was sentenced to one and a half to three years on the Queens charge (to be served concurrently with the parole violation); on November 12, 1975, he was sentenced to one year on the Westchester petit larceny charge, to be served consecutively to the parole violation, but concurrently with the Queens sentence. The parole violation warrant is still outstanding.

> No, I think I said that I would not sentence him to consecutive periods of confinement. I don't have the record here, but my recollection is that I told him that I would not sentence him to consecutive periods of confinement, and I have not. He has received a sentence on the second plea. However, I have suspended its execution and placed him on probation so that he is not faced with consecutive terms. He is not faced, if he minds his business well, with any additional time in connection with the second sentence, and I think that I have carried out my promise and intention. I would not have carried it out if I had sentenced him to periods of confinement on both and had them run consecutively. That I had not intended to do, but I do intend that the sentence of probation be consecutive to the other, and I hope that in the interim period he will learn enough to stay out of trouble, and when he gets out he will have five years during which he will be on probation, and if he minds his business and does not get into trouble, the period of probation will expire and he will do no more time.
>
> (D.14-15).

When defense counsel requested that the Federal sentence be made to run concurrently with the state period of confinement, the Judge revealed that he had no objection to this concurrency, but declined to grant the motion on the grounds that since appellant was then serving his Federal sentence,* it was up to the State authorities to grant concurrency:

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*Appellant had been in Federal custody from April 4, 1975, during which time and before imposition of sentence on these Federal charges, he was finally sentenced on both pending state charges. See fn. at 6, supra.

The point is, I think the application should be made to the State authorities, indicating that he is presently serving his Federal time and requesting them to do what they see fit to do. If they are willing to do it, that is fine with me, and then he will have all of his time served within this five year period.

(D.16).

ARGUMENT

Point I

THE DISTRICT COURT'S FAILURE TO FULFILL THE SENTENCE PROMISE EXPLICITLY MADE TO APPELLANT BEFORE ENTRY OF HIS GUILTY PLEA REQUIRES THAT THE CASE BE REMANDED FOR RESENTENCING.

On December 5, 1975, Judge Ward, forgetting the terms of his sentence promise, imposed a five-year term of imprisonment on Indictment 75 Cr. 367 and a consecutive five-year term of probation plus a $1,000 committed fine* on Indictment 75 Cr. 789.

In response to defense counsel's objection to the sentence imposed, Judge Ward maintained that the promise had been fulfilled. According to the Judge, his promise to appellant had been no more than an assurance that appellant would not receive consecutive periods of incarceration. The assertion that the promise was fulfilled is demonstrably incorrect, and the failure to meet the terms of the promise mandates reversal for resentence.

At the time of the plea, Judge Ward, in explicit and unambiguous language, promised appellant that if he were to plead guilty to the two one-count indictments, the maximum liability

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*See Point II, infra, for appellant's challenge to the constitutionality of imposition of a committed fine on an indigent.

he would face would be five years' imprisonment and a $1,000 fine -- the maximum penalty for either one of the indictments. In open court colloquies with defense counsel, the prosecutor, and then directly with appellant, the promise of concurrent sentences was articulated no fewer than five times. Repeatedly, the Judge assured appellant, speaking in terms of either "concurrency"* or "five-year, $1000 maximums,"** that regardless of a finding that the indictments charged two distinct

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* I don't disagree [that the indictments reflect two distinct offenses], but I am trying to take what I think is the practical approach in the context of this case. I'm assuming for the moment that you are correct, but in the context of this case, as I understand it, with all its ramifications, I would suggest that rather than complicate the issue I am saying now that if there were two separate crimes I would consider that the sentences should be imposed concurrently.

(6).

Have any promises of any sort been made to you to induce you to plead guilty other than the statement that I made a moment or two ago that I would anticipate that any sentences I would impose would be concurrent? Have any other statements or promises been made to you to induce you to plead guilty?

(7).

** So basically, whether I would give you a total ten-year sentence, at least in theory I am telling you now that I would sentence you to a maximum term of five years on each count to run concurrently plus a fine of $1,000.

(5-6).

(Footnote continued on page 11).

offenses, the Judge would treat them as one for purposes of sentence.

The plain meaning of the word "concurrent" establishes the promise of sentences -- whatever their character -- imposed to run "at the same time." WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY, 379 (2d ed. 1970). Similarly, the assertion that five years is the maximum sentence to be imposed means that five years' incarceration is the extent of liability to which appellant was exposed.

In addition, the context in which the promise was made reveals that the Judge, at the plea, communicated exactly what he intended to promise -- namely, that the sentences be served simultaneously. This can be seen from the fact that the sentence commitment arose during, and was intended to settle, a debate between defense counsel and the prosecutor as to whether the indictments charged two separate offenses or one. The Judge felt that concurrency would render irrelevant a determination on this issue. Thus, the Judge must have meant

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(Footnote continued from page 10)

> Mr. Sternlieb, relative to pleading guilty and facing what would be a maximum term of five years plus a fine of $1,000, have you conferred with your attorney, Mr. Gutman, about pleading guilty?

(7).

to impose concurrent sentences, since that was his stated purpose and intent.

Notably absent from the plea proceeding conducted on September 23, 1975, is any reference to the fact that the Judge, in his unqualified commitment to concurrency,* was really only promising to refrain from imposing successive periods of incarceration. Moreover, all that does appear in the transcript squarely contradicts such a restrictive understanding of the promise to sentence concurrently.

On these facts the promise actually made cannot fairly be converted into the one the Judge remembered at sentence, and the promise to sentence concurrently to no more than five years in prison is obviously not fulfilled by the sentence of five years' incarceration followed by a five-year term of special probation.

Terms of supervised release like probation and parole are forms of custody (Jones v. Cunningham, 371 U.S. 236 (1963)), and are punishment. Gagnon v. Scarpelli, 411 U.S. 778, 786 (1973); Morrissey v. Brewer, 408 U.S. 471, 478 (1972); Ferguson v. United States, 513 F.2d 1101 (2d Cir. 1975); Michel v. United States, 507 F.2d 461 (2d Cir. 1974);

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*For example, the initial promise provided:

> If I determine that [the two indictments] are separate, I am telling you now that I will sentence concurrently.
>
> (5).

See also fn.* and fn.**, supra, at 10, 11.

United States v. Richardson, 483 F.2d 516 (8th Cir. 1973). In Ferguson v. United States, supra, 513 F.2d at 1113, this Court, quoting its earlier decision in Michel v. United States, supra, held:

> "[S]pecial parole [*] adds time to a regular sentence...."

This is true because the period of probation itself carries certain substantial restrictions to liberty. United States v. Manfredonia, 341 F.Supp. 790 (S.D.N.Y. 1972), affirmed, 459 F.2d 1392 (2d Cir.), cert. denied, 409 U.S. 851 (1972). Moreover, since probation can be revoked,** its imposition subjects the probationer to the possibility of additional incarceration arising out of the initial judgment of conviction. In this case, the consecutive probationary term extended appellant's liability from the promised five years to a possible ten.

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*In the context of this case, the consecutive period of probation and a term of special parole are substantially similar.

**Revocation of probation and therefore additional incarceration are not restricted to situations where the probationer commits another crime, and in fact result, for example, from a failure of the probationer to make reports to his probation officer, to get a job (United States v. Manfredonia, supra), or to make support payments to his wife (United States v. Wilson, 469 F.2d 368 (2d Cir. 1972)). Moreover, the finding of a violation is neither made after a trial or on proof beyond a reasonable doubt. Gagnon v. Scarpelli, supra; Morrissey v. Brewer, supra.

Because the sentence imposed does not comport with the terms of the sentence promised, appellant is entitled to a remand for resentencing.* Santobello v. New York, 404 U.S. 257 (1971); Geiser v. United States, 513 F.2d 862 (5th Cir. 1975); Lebosky v. Saxbe, 508 F.2d 1047 (5th Cir. 1975); United States v. Brown, 500 F.2d 375 (4th Cir. 1974);** United States v. Goodrich, 493 F.2d 390 (9th Cir. 1974); United States v. Hallan, 472 F.2d 168 (9th Cir. 1973); Gallegos v. United States, 406 F.2d 740 (5th Cir. 1972).

Specifically, in Santobello v. New York, supra, 404 U.S. at 262, the Supreme Court held:

> This phase of the process of criminal justice, and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rests

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*Additionally, the sentence is invalid as premised on a mistake of law. The Judge, in declining to make the Federal sentence concurrent with the State sentences, although he approved such concurrency, did so on the mistaken belief that State authorities had the power at this time to make the sentences concurrent. This is incorrect. Since the State sentences were imposed before the Federal sentence, and since State law provides no procedure equivalent to Rule 35, Fed. R.Cr.P., to modify a sentence once imposed, appellant is precluded from seeking concurrent sentences in the State courts.

**In both Santobello v. New York, supra, 404 U.S. at 263, and United States v. Brown, supra, 500 F.2d at 378, it was recognized that enforcement of the promise is a lesser remedy than withdrawal of the plea. In Brown, the case was remanded for resentence. See also Santobello v. New York, supra, 404 U.S. at 267 (Douglas, J., concurring).

> in any significant degree on a promise or agreement of the prosecutor so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.[*]

While Santobello involved the prosecutor's failure to comply with a promise, the logic of the Court's opinion applies with equal force to a judicial breach of sentence promises (Gallegos v. United States, supra, 466 F.2d at 741) because the Judge's commitment to the defendant is of more significance to him and provides a greater inducement to guilty pleas than would a prosecutor's promise. It is generally known that, in the Federal process, the prosecutor's promise of sentence need not be accepted by the court since it is the court's responsibility to determine sentence. To the contrary, however, the Judge's word is the last word, for he is entrusted by law to impose the sentence.

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*United States ex rel. Selikoff v. Commissioner of Corrections, 524 F.2d 650 (2d Cir. 1975), does not conflict with this holding or the relief requested in the instant appeal. In Selikoff, a defendant who declined the opportunity to withdraw his plea challenged a New York State sentence which violated an original sentence promise. However, in Selikoff, the failure to fulfill the promise was the result of the presentence report's information concerning the defendant's culpability and not, as in this case, merely the result of faulty memory concerning the terms of the promise. Moreover, the opinion in Selikoff, supra, 524 F.2d at 653, makes clear that critical to the Court's holding denying specific performance was the fact that the New York State judges, unlike their Federal counterparts, do not have the power to make unconditional promises regarding sentence prior to seeing the presentence report. Compare N.Y.C.P.L. §390.20(1) with Rule 32(c), Fed.R.Cr.P.

Not only is compliance with the promise mandated on due process grounds, it is required to insure the continued efficacy of the guilty plea process. Santobello v. New York, supra, 404 U.S. at 261. For these reasons, inter alia, the Ninth Circuit, in United States v. Hallan, supra, 472 F.2d 168, relying on Santobello, refused to permit the Government to renege on its promise to dismiss a count of the indictment in exchange for the defendant's plea on the second count, despite a subsequent discovery by the Government that the second count did not state a crime. There, in language directly applicable to this case, the court held:

> It is clear from Santobello v. New York that due respect for the integrity of the plea bargain demands that once the defendant has carried out his part of the bargain the government must fulfill its part.
>
> Id., 472 F.2d at 169.

This case must be remanded to the District Court for resentence in accordance with the sentence promise.*

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*Should this Court decline to grant enforcement of the promise, the case must nonetheless be remanded to provide appellant with an opportunity to withdraw his plea and go to trial.

Point II

IMPOSITION OF A COMMITTED FINE ON APPELLANT, WHO IS INDIGENT AND, FOR THAT REASON, UNABLE TO PAY THE FINE AND THEREBY SUBJECT TO AT LEAST THIRTY ADDITIONAL DAYS OF CONFINEMENT, IS UNCONSTITUTIONAL.

Appellant was sentenced to pay a $1,000 committed fine. Judge Ward imposed this sentence with knowledge that appellant was insolvent, having already found him indigent for purposes of assigning counsel. While willful non-payment of the committed fine would subject appellant to continued indefinite incarceration (18 U.S.C. §3565; Cohen v. United States, 82 S.Ct. 528 (1962)), his failure to pay because of his indigency subjects appellant to an additional thirty-day period of incarceration (18 U.S.C. §3569).*

The effect of this procedure for the collection of fines (United States v. Baird, 241 F.2d 170 (2d Cir. 1957)) is to incarcerate appellant solely because he is poor for thirty days beyond the sentence pronounced by the District Court. Consequently, the operation of §3565 and §3569, as

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*At the end of the thirty days, upon application to the magistrate in which appellant establishes that he is unable to pay the fine, he is discharged. Appellant is still, of course, liable for the amount of the fine, and the United States can bring a lien against his property. Castle v. United States, 399 F.2d 642, 644 (5th Cir. 1968); United States v. Baird, 241 F.2d 170 (2d Cir. 1957); Smith v. United States, 143 F.2d 228, 229 (9th Cir. 1944); United States v. Pratt, 23 F.2d 333 (D.C. Cir. 1927).

it affects appellant, is violative of his constitutional rights to due process and equal protection of the laws,* it is reversible error. Tate v. Short, 401 U.S. 395 (1971); Williams v. Illinois, 399 U.S. 235 (1970); Morris v. Schoonfield, 399 U.S. 508 (1970); United States v. Wilson, supra, 469 F.2d at 370; Frazier v. Jordan, 457 F.2d 727 (5th Cir. 1972); McGinnis v. United States ex rel. Pollack, 452 F.2d 833 (2d Cir. 1971); United States v. Gaines, 449 F.2d 143 (2d Cir. 1971).**

Because appellant's liberty, clearly a fundamental right (United States Constitution, Amendment V) is affected adversely by §3565 and §3569, the standard for evaluating the constitutionality of these sections is whether they can be "shown

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*Due process has been held to incorporate equal protection because of the absence of an equal protection clause in the Fifth Amendment. Bolling v. Sharpe, 347 U.S. 497 (1959).

**Of course appellant can challenge this portion of his sentence despite the fact that it will not begin to run until completion of his term of imprisonment. Peyton v. Rowe, 391 U.S. 54 (1968).

to be necessary to promote a compelling governmental interest,"* Shapiro v. Thompson, 394 U.S. 618, 634, 638 (1969); see also Survey Note, Developments in the Law: Equal Protection, 82 Harv. L.Rev. 1065 (1969).**

Clearly, the Governmental interest sought to be promoted by §3565 is to provide a coercive means to insure the collection of fines (Tate v. Short, supra, 401 U.S. at 399), and not to provide additional punishment for the crime committed. Williams v. Illinois, supra, 399 U.S. at 240; Smith v. United States, supra, 143 F.2d 228; People v. Saffore, 18 N.Y.2d 101 (1966). The jailing of an indigent, however, pursuant to this statute, runs in contravention to that interest*** for, not only is it powerless to compel, in these circumstances, payment of the fines; it also imposes upon the Government the additional expense of incarceration. As the Supreme Court cogently observed in Tate v. Short, supra:

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*Since it is a vital constitutional right which is at issue, the traditional, less strict test (whether the classification is "without reasonable basis," Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911), is not applicable here. Shapiro v. Thompson, supra, 394 U.S. 618.

**Alternatively, because these provisions create two disparately treated classes -- those who can pay the fine immediately and those who can satisfy it only over a period of time, if at all -- defined by wealth, the classification is "suspect, and triggers the imposition of the compelling state interest test." Frazier v. Jordan, supra, 457 F.2d at 728; see also In re Antazo, 473 P.2d 999 (Cal.Sup.Ct. 1970).

***As an alternative the Supreme Court suggests an installment method of fine collection. Tate v. Short, supra, 404 U.S. at 399.

> [T]he defendant cannot pay because he is indigent and his imprisonment, rather than aiding collection of the revenues, saddles the [Government] with the cost of feeding and housing him for the period of his imprisonment.
>
> Id., 401 U.S. at 399.

Failing the test of necessity to the promotion of a valid governmental interest, the consequent discrimination engendered by the statute between those who can afford to pay the fine and go free and those who cannot pay it and therefore must remain in jail is unconstitutional. Tate v. Short, supra, 401 U.S. at 399. Where imprisonment "results directly from an involuntary non-payment of a fine, ... we are confronted with an impermissible discrimination that rests on ability to pay...." Williams v. Illinois, supra, 399 U.S. at 241; Morris v. Schoonfield, supra, 309 U.S. 508.

Relying upon Williams and Tate, this Court has noted that the revocation of probation and the imposition of a prison term solely because of impecunity would not meet constitutional standards, United States v. Wilson, supra, 469 F.2d at 370, and earlier, in a proceeding to correct a sentence so as to credit a defendant with the time spent in a state facility because he could not make bail, this Court held that "a man should not be kept in prison solely because of his lack of wealth...." McGinnis v. United States ex rel. Pollack, supra, 452 F.2d at 836, citing United States v. Gaines, supra, 449 F.2d at 144.

In fact, the Government has conceded before this Court that

incarceration of an indigent pursuant to 18 U.S.C. §3569 is unconstitutional (United States v. Wolff, Doc. No. 73-1284). Further, Bureau of Prisons Policy Statement 2101.2A(June 25, 1971),* concludes:

> The United States Attorney should be advised that no commitment for non-payment pursuant to 18 U.S.C. 3569 will be carried out in view of the Supreme Court's ruling in the Williams and Tate cases. A copy of that notification to the United States Attorney should be sent to the Office of General Counsel of the Bureau.

While it is comforting that both the Bureau of Prisons and the Department of Justice agree that the statute is unconstitutional, absent a declaration to that effect by this Court or Congressional repeal of the law, there is nothing, the policy statement included, which is binding upon the Government.

The Bureau of Prisons policy statement is issued pursuant to 18 U.S.C. §4042, in furtherance of the Bureau's duty to manage and regulate Federal penal institutions. Policy statements can be, and frequently are, withdrawn or superseded without notice. That it is today the policy of the Bureau of Prisons not to detain an indigent prisoner who is unable to pay a committed fine does not insure that the Bureau will not at some time reverse that policy. Consequently a decision by this Court declaring 18 U.S.C. §3569 unconstitutional is

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*The policy statement is "E" to appellant's appendix.

necessary to protect appellant from a statutorily authorized, but nonetheless unconstitutional, thirty-day period of incarceration.

Appellant requests that this Court declare 18 U.S.C. §3569 unconstitutional and direct that appellant be administered an oath of indigence prior to commencement of the thirty-day term so that he need serve no period of incarceration because of indigence.

CONCLUSION

For the above-stated reasons, the case must be remanded for resentence in accordance with the sentence promise, and 18 U.S.C. §3569 must be declared unconstitutional.

Respectfully submitted,

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
JEROME STERNLIEB
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

SHEILA GINSBERG,
Of Counsel.

Certificate of Service

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I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

Sheila Gaskey